Supreme Court, U.S.
FILED
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No. 08-

IN THE

Supreme Court of the United States

DENISS GLADKIHS,

Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO DISTRICT COURT FOR THE EIGHTEENTH JUDICIAL DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Colorado Supreme Court denied a Writ of Certiorari, affirming the decision of the Colorado District Court, Eighteenth District for the County of Arapahoe, Colorado denying petitioner's appeal of the Arapahoe County Court verdict.

Should a County Prosecutor's act of filing a series of motions to continue, alleging the unavailability of a witness, be allowed by the trial court to continuously extend a defendant's statutory speedy trial date using the exclusion under C.R.S. § 18-1-405(g) (unavailable witness) thus, effectively rendering a defendant's Constitutional and statutory right to a speedy trial meaningless?

Can an appellate court affirm a decision of the trial court with respect to defendant's Constitutional and statutory right to a speedy trial based on a provision in the Colorado Revised Statutes C.R.S. § 18-1-404(3.5), that was not considered or relied on by the trial court?

Can a trial court require that a defendant show the existence of evidence contrary to the surprise testimony of an alleged "expert witness" before granting a recess or continuance to allow the defense to deal with the surprise evidence at trial?

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OPINION BELOW

The Arapahoe County Court, State of Colorado (trial court) denied Mr. Gladkihs' motions to dismiss for violation of his Constitutional and statutory right to a speedy trial. The trial court granted the People 3 separate motions to continue due to the unavailability of the same witness.

On a separate issue, the trial court denied Mr. Gladkihs' request for a recess or continuance to allow defendant to obtain testimony or evidence to rebut the surprise testimony of an expert witness called by the people. Mr. Gladkihs was subsequently found guilty of driving under the influence of alcohol.

Mr. Gladkihs timely appealed the actions of the trial court with respect to these issues to the Colorado District Court for the Eighteenth Judicial District, Arapahoe County. On September 17, 2008, the District Court affirmed the guilty verdict. The opinion of the District Court specifically held that Mr. Gladkihs' trial was not a violation of his right to a speed trial because C.R.S. § 18-1-405(3.5) automatically granted an extension of the statutory speedy trial deadline when a defendant fails to appear for a trial. The District Court further affirmed the trial court's denial of a continuance due to the surprise testimony because Mr. Gladkihs did not show at the time that any evidence existed to rebut the witness.[1]

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1. Mr. Gladkihs appealed a number of issues to the District Court, but the appellate court did not address them. Mr. Gladkihs is not raising any of those issues in this Petition.

Mr. Gladkihs' timely filed a Petition for Writ of Certiorari with the Colorado Supreme Court. The Colorado Supreme Court denied the Petition on March 2, 2009.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

> shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

1. On or about February 7, 2004, Mr. Gladkihs was charged with driving under the influence of alcohol and driving under the influence *per se*.[2] Mr. Gladkihs pleaded not guilty to the charges on May 5, 2004. Pursuant to the provisions of Colorado Revised Statutes § 18-1-405 Mr. Gladkihs' statutory right to a speedy trial initially ran to November 5, 2004.

> (1) Except as otherwise provided in this section, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the date of the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, and, whether in custody or on bail, the pending charges shall be dismissed, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode.

---

2. The People subsequently moved to add the charge of failure to obey a traffic signal, which the trial court granted.

2. The last date for Mr. Gladkihs' waiver of his Constitutional and statutory right to a speedy trial was on January 31, 2005. At that time the trial date was set for May 16, 2005. According to C.R.S. § 18-1-405(6)(f), the applicable speedy trial deadline was July 31, 2005.

> (6) In computing the time within which a defendant shall be brought to trial as provided in subsection (1) of this section, the following periods of time shall be excluded: . . .
>
> (f) The period of any delay caused at the instance of the defendant;

3. After the waiver on January 31, 2005, Mr. Gladkihs expressly and vigorously asserted his right to a speedy trial, both on Constitutional and statutory grounds.

4. The matter proceeded to a jury trial on May 16, 2005, but the jury could not reach a verdict on the charge of driving under the influence of alcohol. The Court properly declared a mistrial. In open court and on the record, the matter was set for a new trial on July 5, 2005[3]. All parties were present when the date was set and the People accepted the trial date.

5. On June 27, 2005, the People moved to continue the jury trial set for July 5, 2005 because an essential witness, Deputy Kading, was unavailable to testify on that date as he would be out of town.

---

3. This date was within the speedy trial period pursuant to Mr. Gladkihs' waiver executed on January 31, 2005.

6. The People's motion did not comply with the requirements of C.R.S. § 18-1-405(6)(g):

> (g) The period of delay not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney, without the consent of the defendant, if
>
> (I) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that this evidence will be available at the later date; or . . .

7. Mr. Gladkihs had no objection to this first request for a continuance by the People. The hearing on the motion was held on July 5, 2005, the scheduled trial date. Counsel for Mr. Gladkihs was present by telephone. The trial court reset the trial for July 25, 2005, a date that was specifically accepted by the People.

8. On July 18, 2005, the People moved to continue the trial set for July 25, 2005, again, due to it being a "bad date" for Deputy Kading. Once again, the motion did not explain why the People had accepted the trial date without clearing the date with their witness. There was no explanation for the cause of Deputy Kading's absence or of the efforts of the prosecution to ensure his presence at the trial.

9. Mr. Gladkihs vigorously objected to another continuance. It is Mr. Gladkihs' position that the three month tolling of the speedy trial period provided for in C.R.S. § 18-1-405(e) following a mistrial means that the new trial must be held no later than 3 months after the declaration of the mistrial. Accordingly, Mr. Gladkihs maintains that the statutory speedy trial period ended on August 15, 2005.

> (e) The period of delay caused by any mistrial, not to exceed three months for each mistrial;

10. At the hearing held on the People's motion to continue on July 25, 2005, the trial court disagreed with Mr. Gladkihs' interpretation of the statute. According to the trial court, the period between the mistrial and the first setting of a new trial date is excluded from the calculation of the 6 month period. After that first trial setting, the number of days remaining for the speedy trial deadline at the time of the mistrial continued to apply. Thus, the trial court held that the People had 75 days from July 5, 2005 in which to hold the trial. The trial court held that the speedy trial date ended on September 18, 2005. Over the objection, the Court granted the People's motion and reset the trial date to September 12, 2005.

11. On September 9, 2005, Mr. Gladkihs filed a motion to dismiss for violation of Constitutional and statutory rights to a speedy trial. The trial court did not rule on this motion. On September 12, 2005, the People moved yet again to continue the trial date pursuant to C.R.S. § 18-1-405(6)(g)(I). The motion was made orally in open court and was due to the alleged

inability of Deputy Kading to be present at the trial for personal reasons.

12. In spite of his previous ruling that the speedy trial deadline was September 18, 2005, the trial court granted the People's third motion to continue due to the unavailability of Deputy Kading to be present for the scheduled trial date. the trial court proceeded to continue the trial date, stating that C.R.S. § 18-1-405(g) was dispositive and the case law permitted a continuance under the circumstances presented, even though two previous motions to continue had been granted on the same grounds.

13. The trial court set a new trial date for December 12, 2005, nearly three months after the September 18, 2005 date that the trial court determined to be the speedy trial deadline and seven months after the mistrial.

14. On the morning that trial was to commence, December 12, 2005, Mr. Gladkihs filed another motion to dismiss the case for violation of his statutory and Constitutional rights to a speedy trial. The trial court denied the motion and the matter proceeded to trial.

15. During the trial to the jury, Fred Maxwell, the People's witness, testified as to the results of his own informal testing of the effect of Ambesol on the Intoxilizer 5000EN. Mr. Gladkihs was not given any notice that Mr. Maxwell would testify on this issue until the morning the People called Mr. Maxwell as an expert witness.

16. Mr. Gladkihs had previously stipulated that Mr. Maxwell was qualified as an expert witness solely with respect to the mechanics and specifications of the Intoxilizer 5000EN, the machine utilized in this case. The People did not inform counsel for Mr. Gladkihs that Mr. Maxwell would be conducting such tests; neither the People nor Mr. Maxwell provided copies of any test results or reports made by Mr. Maxwell in the course of his informal tests.

17. Mr. Gladkihs vigorously objected to allowing Mr. Maxwell to testify as to the effects of Ambesol on the Intoxilizer results. One of the major objections to Mr. Maxwell's testimony is that he may have been qualified to testify as an expert as to the maintenance and operation of the Intoxilizer 5000EN, but he was not qualified to testify as an expert as to the effect of various substances on the intoxilyzer results. The People made no effort to qualify Mr. Maxwell as an expert in that subject.

18. It is Mr. Gladikihs' theory defense that it was his extensive use of Ambesol to treat a painful open root canal in a tooth that resulted in a finding by the machine that he was intoxicated. Mr. Gladkihs requested that Mr. Maxwell's testimony be excluded, or failing that, that the trial court grant a continuance or recess of the trial to allow his counsel to prepare for cross-examination and/or to obtain a rebuttal witness.

19. The trial court held that Mr. Maxwell was presented as a rebuttal witness with respect to Mr. Gladkihs' theory of defense, even though he was called as a witness in the People's direct presentation of their

case. Therefore, Mr. Gladkihs was not entitled to notice of the proposed testimony.

20. The trial court also held that it could not grant a continuance or recess for the purpose of preparing for Mr. Maxwell's testimony on the grounds that his docket schedule did not allow him to do so.

21. Following Mr. Maxwell's direct and cross-examination testimony, Mr. Gladkihs again moved for a continuance which the trial court denied.

22. The jury found Mr. Gladkihs guilty of driving under the influence of alcohol and driving under the influence *per se*, and the verdict was entered on December 15, 2005.

23. Mr. Gladkihs filed a timely appeal of the verdict to the District Court for Arapahoe County, State of Colorado. The appellate court affirmed the verdict. The appellate court specifically held that Gladkihs failed to appear for a trial date on July 5, 2005. As a result, C.R.S. § 18-1-405(3.5) automatically extended the speedy trial period six months to January 5, 2006. Thus the December 12, 2005 date was before the applicable speed trial deadline. The fact that the trial court had continued the trial on other statutory grounds, did not rely on C.R.S. § 18-1-405(3.5) in any of its rulings on the speedy trial issue, and did not treat the July 5, 2005 as a "trial date" but as a motions hearing were considered to be irrelevant by the appellate court.

24. The appellate court then found that the trial court's denial of a continuance to Mr. Gladkihs based

on Mr. Maxwell's surprise testimony was not an abuse of discretion. The appellate court did not address the grounds on which the trial court based its denial, i.e. that Mr. Maxwell was a rebuttal witness and that the court had no time in its schedule for a recess or continuance. Instead, the appellate court held that to show the existence of prejudice due to surprise (*People v. Steele*, 193 Colo. 87, 563 P. 2d 6 (Colo. 1977), the defendant must affirmatively show that evidence to rebut the surprise testimony actually existed and that he would have been able to obtain and/or use such evidence at trial. The appellate court specifically stated that Mr. Gladkihs had no grounds to complain about the trial court's ruling on due process grounds because he "had not shown that such evidence even exists."

REASONS FOR GRANTING THE PETITION

This Court has stated that the right to a speedy trial is as fundamental and any of the rights secured to the defendant by the Sixth Amendment. (*Barker v. Wingo*, 407 U.S. 514).

The Court then identified four factors which are to be considered in determining whether the Constitutional right to a speedy trial had been violated:

1) the length of the delay;

2) the reason for the delay;

3) the defendant's assertion of his right to a speedy trial; and

4) the existence of prejudice to the defendant.

There is a presumption of prejudice if the delay in bringing the defendant to trial is extended (over one year). (*Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 520 (1992).

In this case the delay in bringing Mr. Gladkihs to trial was March 5, 2004 to December 12, 2005, nearly two years. The reasons given by the People for the delay, with the exception of the continuance on September 12, 2005, appear to be solely the prosecutor's inability to properly coordinate trial dates with the witness. Mr. Gladkihs continually and vigorously asserted his right to a speedy trial. Due to the length of the delay, there is a presumption of prejudice that has not been overcome by the People.

The important issue, which does not seem to have been addressed before, is whether the prosecution can use statutory exceptions to the speedy trial deadlines serially, sequentially, or use multiple exceptions with respect to the unavailability of the same witness to indefinitely suspend the running of the speedy trial deadline. This Court should prohibit that practice, or in the alternative require that the prosecution strictly comply with the statutory and Constitutional provisions. If that is not done, the Constitutional and statutory right of a defendant to a speedy trial is meaningless.

In *Lee v. Kemna*, 534 U.S. 362, 122 S. Ct. 877, 151 L. Ed. 820 (2002), this court held that the injection of a state procedural rule that was not even mentioned or relied on by the trial court in its ruling is not sufficient to prevent a defendant from adjudicating the due process claims. Similarly, in this case the appellate court

used a statutory provision that had not been mentioned or relied on in the trial court to affirm the verdict.

Following remand, (2004 U.S. District Lexis 13356), the District Court for the Western District of Missouri stated the standard for determining when a failure to continue is so arbitrary as to violate due process, i.e. that there was no reasonable probability that the outcome of the trial would have been different. In this case there is more that a reasonable probability that the outcome of the trial would have been different. Mr. Gladkihs would have the opportunity to present evidence to rebut Mr. Maxwell's testimony with respect to the validity of the alleged tests. Mr. Maxwell had previously been qualified as an expert with respect to another very different aspect of the operation of the intoxilyzer. There was no attempt to qualify him as an expert also in the chemical analysis and the effects of various substances on intoxilyzer results. There was no cautionary instruction that his testimony as to Ambesol was a different category than his previous testimony. This created the very real likelihood that the jury accepted his testimony on Ambesol as expert opinion when it was not.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE DISTRICT COURT, ARAPAHOE COUNTY, COLORADO FILED SEPTEMBER 17, 2008

DISTRICT COURT
ARAPAHOE COUNTY, COLORADO
Arapahoe County Justice Center
7325 S. Potomac Street
Centennial, CO 80112

Appeal from the County Court of Arapahoe County
Division B-2, Honorable Judge Stephen R. Ruddick
Case No. 18504T1409

Case Number: 2006CV82

Division: 408

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,
v.
DENISS GLADKIHS,
Defendant-Appellant.

ORDER REGARDING COUNTY COURT APPEAL

THIS MATTER comes before the Court on the Defendant/Appellant's ("Defendant") appeal of the County Court's decision in 18504T1409. This Court, having considered the briefs presented and the record below, enters orders as follows:

Appendix A

A. Were Defendant's constitutional or statutory speedy trials rights violated?

Trial was held December 12, 2005. Defendant contends that his speedy trial period expired prior to that date, and that the charges should have been dismissed pursuant to the Fourth and Fourteenth Amendments to the United States Constitution; Article II, Section 16 of the Colorado Constitution; and C.R.S. §18-1-405. Defendant correctly states that the statute gives full effect and meaning to constitutional speedy trial rights, and the People do not disagree.

Resolution rests on an examination of the dates of the various trial continuances and the reasons therefore.

1. Defendant entered a plea of not guilty on May 5, 2004. Thus, his original speedy trial date was six months later: November 5, 2004.

2. Defendant requested two continuances which extended the speedy trial date to July 31, 2005.

3. Trial began May 16, 2005, and ended in a mistrial on May 19, 2005.

4. The case was again set for trial on July 5, 2005, which is within the then-existing speedy trial date of July 31, 2005.

5. The Defendant failed to appear for trial on July 5, 2005.

6. The Defendant appeared the next day, July 6, 2005 and the case was set for trial on July 25, 2005.

Appendix A

While the July 25, 2005 trial date was set before the July 31, 2005 speedy trial deadline, a question arises as to what effect the Defendant's failure to appear for trial on July 5, 2005 had upon his speedy trial date. Colorado Revised Statutes § 18-1-405(3.5) provides:

> If a trial date has been fixed by the court and the defendant fails to make an appearance in person on the trial date, *the period within which the trial shall be had* ***is extended*** for an additional six-month period from the date of the defendant's next appearance.

C.R.S. § 18-1-405(3.5) (2008) (emphasis added).

The language of the statute is clear and does not turn upon any findings by the Court or await a request by either of the parties. If the defendant fails to appear for trial, the speedy trial date is automatically extended for an additional six months. Here, that would be from July 5, 2006 to January 5, 2006. The provisions of C.R.S. §18-1-405 are mandatory and leave no discretion for the court to fashion exceptions other than those set forth in the statute. *People v. Rosidivito*, 940 P.2d 1038 (Colo. App. 1996). There is no provision for creating an exception where the defendant fails to appear as the unfortunate result of a clerical error. Nor is there a provision creating an exception where both parties accept a new trial date within the original speedy trial period.

The trial in this matter was held on December 12, 2005, which is prior to expiration of the January 5, 2006 speedy trial date. Based upon the foregoing, the Court does not address the balance of the parties' arguments concerning

the extensions of the trial dates between July 5, 2005 and December 12, 2005, all of which were within the defendant's speedy trial date.

B. Was there any abuse of discretion by the county court placing limitations on the defendant's closing argument?

Our appellate courts have made it clear that the scope of closing argument rests in the sound discretion of the trial court, and its rulings will not be disturbed by an appellate court in the absence of gross abuse of discretion resulting in prejudice and a denial of justice. *See People v. Moody*, 676 P.2d 691 (Colo. 1984); *People v. Walters*, 821 P.2d 887 (Colo. App. 1991).

The defendant contends that the trial court abused its discretion by not allowing him to refer to "life, liberty, and the pursuit of happiness" in his closing argument. He cites neither case law nor statutory authority to support his argument, nor does he contend that the court's ruling created any prejudice or denial of justice. Therefore, the Court will not disturb the orders of the trial court regarding closing arguments in this appeal.

C. Did the trial court err in allowing Deputy Luedtke to testify beyond the scope of the court's Order on defendants' motion *in limine*?

The trial court ruled on the defendant's motion in limine as follows:

Appendix A

[Defendant's motion in limine on roadside maneuvers – granted as to allowing Deputy Ludetky to testify at trial only as *a non-expert* on preliminary breath test (PBT), walk & turn & 1 leg stand and for horizontal gaze & nystagmus (HGN) only as "clues" if properly administered & Deputy qualified to conduct HGN test (HGN is the only scientific test) from his own training, experience and observations]*

The defendant contends that the following testimony violated the court's order *in limine*:

Q Okay. I apologize. Have you seen a sober person perform the walk and turn?

A Yes I have.

Q How many times?

A Ten to 20.

Q Okay. And did the Defendant perform this exercise as a sober person would have?

A No he did not.

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* In the Colorado District Court's opinion affirming Mr. Gladkihs' guilty verdict, the appeals court included a photocopy of the County Court Judge's handwritten notes regarding the granting of Mr. Gladkihs' motion in limine. The trial court's notes are difficult to read, being both handwritten and apparently using the court's own system of shorthand.

Q Okay. Have you seen a sober person perform the one legged stand?

A Yes I have.

Q The same number of times you've seen the other exercises?

A Yes.

Q And did the Defendant perform as a sober person would have?

A No he did not.

Transcript B4, page 98, lines 18-25; page 100, lines 16-24.

There was no contemporaneous objection by the defendant to Deputy Luedtke's testimony. The Supreme Court, in *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770 (1993), held that unpreserved constitutional claims are subject to plain error analysis. In so holding, the Court reaffirmed the fundamental standard governing relinquishment of unpreserved claims: "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Id.* Colorado follows this holding and language. *See People v. Miller*, 113 P.3d 743 (Colo. 2005).

The People established that Deputy Luedtke had observed both sober and intoxicated people perform the maneuvers in question. C.R.E. 701 allows non-experts to express opinions which are "(1) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based upon scientific, technical, or other specialized knowledge within the scope of Rule 702."

A police officer may offer lay testimony based upon his perception and experience which does not require specialized training or experience, just like any other lay witness. *People v. Tallwhiteman*, 124 P.3d 827 (Colo. App. 2005). The establishment of qualifications for a lay witness to express an opinion is a question for the trial court and will not be overturned unless clearly erroneous. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

The Court does not find plain error in the allowance of Deputy Leudtke's testimony.

D. Did the trial court err in refusing to allow Mr. Gladkihs a recess or continuance to obtain a rebuttal expert?

At his first trial, the defendant revealed that part of his defense would be that he had used Ambosol prior to driving, and that he would argue that Ambosol had caused the Intoxilyzer to record an incorrect level of alcohol in his system. At the second trial, the People called Mr. Maxwell to testify with regard to tests he

conducted on the effect of Ambosol on the Intoxilyzer machine. As the result of his test, Maxwell concluded that using Ambosol would have had no effect on the Intoxilyzer result. It is undisputed that Mr. Maxwell's opinions were not disclosed until moments before he testified.

The People contend that Mr. Maxwell was a rebuttal witness whom they have no duty disclose. *People v. Avila*, 944 P.2d 673, 675 (Colo. App. 1997). Defendant disagrees and contends that Maxwell was not a rebuttal witness but was part of the People's case-in-chief who was called to rebut the evidence concerning Ambosol's effect on the Intoxilyzer which the defendant presented at the first trial. Defendant argues that what may have been rebuttal evidence at the first trial had become direct evidence at the re-trial. Defendant contends that such was improper expert testimony in violation of Rule 16.

Rule 16 requires the People to disclose "any reports or statements of experts made in connection with the particular case, including results of . . . scientific tests, experiments and comparisons." Colo. R. Crim. P. 16 Part I (a)(1)(III). Further, Rule 16 Part II (c) requires the People to notify defense counsel of any additional witnesses which the prosecution intends to call to rebut a disclosed defense within a reasonable time after the witness' identity becomes known. The Court notes there is a difference between rebuttal testimony offered to rebut a defense – which requires disclosure – and evidence introduced solely to impeach the credibility of

a defense witness - which does not require disclosure. *People v. Avila*, 944 P.2d 673, 675 (Colo. App. 1997); *People v. Vollentine*, 643 P.2d 800 (Colo. App. 1982); *People v. Muniz*, 622 P.2d 100 (Colo. App 1980).

The prosecution is required to provide notice of every witness that it intends to call at trial. C.R.S. § 16-5-203 (2008); Colo. R. Crim. P. 16(I)(a)(1)(VII). If the witness is an expert, the prosecution must provide pertinent reports and statements at least thirty days before trial. Colo. R. Crim. P. 16(I)(a)(1)(III), (b)(3); *People v. Jowell*, __ P.3d __, 2008 WL 191485 (Colo. App. Jan. 24, 2008).

The People's expert witness designation of Mr. Maxwell on May 19, 2005, was as follows:

> 2. Fred Maxwell
> Colorado Dept of Public Health and Environment
> Laboratory Services Division /
> Certification Progam
> 8100 Lowry Blvd
> Denver, CO 80230
> (303) 692-3293
>
> The People intend to call an expert at trial to help the jury understand the Intoxilyzer 5000EN and the Colorado Dept of Health Rules and Regulations. His CV is attached.

There was no mention of any tests concerning Ambosol's effect on the Intoxilyzer. The People properly endorsed

Mr. Maxwell but did not disclose the results of the Ambosol/Intoxilyzer tests. The tests were run by Mr. Maxwell the day before trial (Maxwell testimony Lower Court Record - Transcript 12-14-05 - part 8 08-30-06)

An appellate court reviews a trial court's decision whether to grant a continuance on an abuse of discretion standard. *Balltrip v. People*, 401 P.2d 259, 262–63 (Colo. 1965). Under these circumstances, in order for there to be an abuse of discretion by the trial court, the defendant has the burden of establishing: (1) prejudice due to surprise; (2) an inadequate opportunity to interview a late endorsed witness; and (3) that he made a timely request for a continuance which is denied by the trial court." *People v. Steele*, 193 Colo. 87, 563 P.2d 6 (Colo. 1977) *(citing People v. Bailey, Colo.*, 552 P.2d 1014 (1976); *Reed v. People*, 171 Colo. 421, 467 P.2d 809 (1970); *Peppers v. People*, 166 Colo. 93, 441 P.2d 668 (1968); *Gorum v. People*, 137 Colo. 1, 320 P.2d 340 (1958)).

The Defendant made a timely objection to Mr. Maxwell's testimony and did request a recess or continuance in order to procure an expert in rebuttal thereto. However, Defendant has not made a showing of prejudice as a result of the trial court's denial of his request. There has been no showing that an earlier disclosure or the granting of an continuance would have made any difference in the outcome of the trial. For example, there is no showing that there was evidence or information available which the Defendant would have been able to obtain and use at trial to demonstrate that Mr. Maxwell was wrong or which could have been used

to impeach Mr. Maxwell or his findings. There has been no showing that such evidence even exists. The trial court did not abuse its discretion in denying the defendant's request for continuance.

E. Was the failure to record bench conferences reversible error?

Defendant contends that during an unrecorded bench conference, the trial court heard argument and ruled on his objection and continuance request. Whether such oversight caused the requisite prejudice to the defendant depends upon whether anything which took place during the bench conference materially adversely affect the defendant. The only issue of significance which the defendant contends took place during the unrecorded bench conference was the argument and ruling on his request for a continuance due to the undisclosed testimony of Mr. Maxwell. The parties have fully briefed that issue before this court, and the court assumes that the same arguments which were presented at the bench conferences have been presented in the briefs. Therefore, the resolution of the undisclosed expert/continuance issue is dispositive of the unrecorded bench conference issue.

Because this Court has found that the trial court did not abuse its discretion by denying the continuance, the Court does not find reversible error in the trial court's failure to record a bench conference related to the continuance issue.

Appendix A

THE COURT HEREBY FINDS AND HOLDS: The Order and Judgment of the County Court is **AFFIRMED.**

IT IS SO ORDERED this 17th day of September, 2008.

BY THE COURT:

s/ Charles M. Pratt
Charles M. Pratt
District Court Judge

APPENDIX B — EXCERPTS FROM COUNTY COURT TRANSCRIPT DATED DECEMBER 12, 2005

[Commencing at page 14]

* * *

THE COURT: Start over again. The court in deciding on September twelfth the issue under eighteen one four 0 five six G I pondered or thought about whether the language in subparagraph I referring to evidence included witnesses. Because the rest of the statute tends to reflect whether witnesses are unavailable not necessarily evidence. But there was case law cited by the District Attorney that the court reviewed at the time that indicated that yes witnesses were evidence as we all sort of know (inaudible) they testify and include evidence through their testimony. I did find at that time that the state had made reasonable due diligence to obtain the witnesses and had failed to do so. If I am wrong on that then that is certainly something that is appealable but it is the last day that the case could be heard. The court had found that speedy trial if it hadn't run it pretty much um dissipated and I didn't make a final ruling on that but it was so close that I really thought that there was very little hope for any other days in fact as I had calculated it the court found that speedy trial would have expired on September eighteenth if not for the state's exercise of the use of eighteen one four 0 five subparagraph six G I. I calculated the speedy trial would run on September eighteen because I, I had calculated that there were seventy five days from May sixteenth trial date that were excludable. I'm sorry there were seventy five days

left on May sixteenth that the excludable period was May nineteenth to July fifth therefore that made that September eighteenth as the last day of seventy five days running from July fifth to September eighteenth. This case being set on September twelfth (inaudible) six meaningless days and why I say six is because I can't get a jury trial called except on Mondays so by a six day period is meaningless to me. So when the District Attorney made their record they're bound by the record they made on September twelfth. I'm not going to reopen that issue to give them another chance to provide other evidence of due diligence. I'm not going to reopen it so I can reconsider my ruling of due diligence. I just made that ruling and having made that ruling that means there as a three month period of delay. December twelfth would be under statutory proceedings then the last day. The end of the three months. And again as I read this statute it is to allow one continuance not to exceed three well it could be six months excuse me. Couldn't it. Cause under subparagraph G it's a six month period of continuance. That it not exceeding six months. So again I think this is the drop dead date. Now that statutory now counsel has then raised the issue of the constitutional ramifications of such a long period of time. Obviously that (inaudible) constitutional issue of speedy trial sits on other grounds. It doesn't require that there be a violation of statutory grounds in fact speedy trial sometimes can statutorily be way down the road and constitutional issues arise. And what's required of course is a four part factor on constitutional issues. One there is the length of delay which is horrendous, horrible and deplorable. The reason for the delay. Well actually as

backed up as the court always is it doesn't appear that the court ever had a continuance on it's own motion or for um docket congestion. They were either by the state or by the defense. After about an equal amount of time of delay by the defendant who began asserting his right to constitutional proceedings as the District Attorney began requesting continuances. So I think the reason for the delay and the length of the delay balanced towards the defendant. Also his assertion or demand for speedy trial's a factor. You can't start um demand a constitutional right until you start exercising it. I believe they began that in July, July twenty fifth. But at the last record the court did not have evidence from and no offer of proof on was prejudice to the defendant. It isn't prejudice (inaudible) people have to come to court. Goodness gracious um that's not prejudice. Prejudice in the constitutional sense is how is the defendant's defense impaired. What witnesses disappeared or died. How did it affect the goal of the defense to raise a defense. So because the court didn't hear that the defendant was prejudiced in a constitutional sense rather than a human sense on them to come to court all the time the motion for dismissal based on constitutional and statutory right to speedy trial would be denied. With that in mind I assume we're all ready to proceed again in trial on this matter?

MS. ROLFUS: Yes your honor.

THE COURT: And is the defense ready to proceed?

MR. SCHENDZIELOS: Your honor let me advise the court that based on uh the ruling that the court has just handed down it is defense counsel's intention to file a rule one 0 six A four complaint which I will represent to the court. We will have filed in the District Court uh before noon today. At that time we would be moving the court uh to stay these proceedings pursuant to the authority that this court has in the first instance pending a review and a decision on the uh one 0 six A four um right of prohibition essentially your honor that we would be seeking. So.

* * * *

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF COLORADO DENYING PETITION FOR WRIT OF CERTIORARI DATED MARCH 2, 2009

SUPREME COURT
STATE OF COLORADO

Supreme Court Case No:
2008SC837

Petitioner:

Deniss Gladkihs,

v.

Respondent:

The People of the State of Colorado.

Certiorari to the District Court, Arapahoe County,
06CV82 County Court, Arapahoe County, 04T1409

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the District Court of Arapahoe County and after review of the record, briefs, and the judgment of the district court,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is DENIED.

BY THE COURT, EN BANC, MARCH 2, 2009.